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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-442

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

MARTIN J. FITZPATRICK,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

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Table of Contents.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
A. Constitutional provisions involved	2
B. Statutory provisions involved	2
Statement of the Case	3
Reasons for Allowance of the Writ	4
Conclusion	8
Appendix A. Opinion of Court Below	1a
Appendix B. New York State Penal Law, Section 125.25, subdivision 1—Murder (Intentional)	18a
Appendix C. New York State Penal Law, Section 125.25, subdivision 3—Murder (Felony Murder)	18a
Appendix D. New York State Penal Law, Section 125.30—Murder; sentence	19a
Appendix E. New York State Penal Law, Section 125.35—Murder, proceeding to determine sentence; appeal	20a

CITATIONS.

	Page
Cases:	
Furman v. Georgia, 408 U. S. 238 (1972)	5
People v. Fitzpatrick, 32 N. Y. 2d 499 (1973)	4, 5
Statutes:	
New York State Penal Law, Sec. 125.25	2
New York State Penal Law, Sec. 125.30	2
New York State Penal Law, Sec. 125.35	3

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Petition for a Writ of Certiorari to the Court of Appeals of New York.

The People of the State of New York petition for a writ of certiorari to review the judgment of the New York Court of Appeals, filed June 19, 1973, vacating the sentence of death imposed on respondent under Sections 125.30 and 125.35 of the New York State Penal Law, as being violative of the Eighth Amendment of the United States Constitution.

Opinion Below.

The opinion of the New York Court of Appeals is reported at 32 N. Y. 2d 499 (1973) and is printed as Appendix A.

Jurisdiction.

The judgment of the Court of Appeals of New York was filed on June 19, 1973.

Jurisdiction is conferred on this court by 28 U. S. C. 1257(3).

Question Presented.

Whether, in light of the Eighth and Fourteenth Amendments, the New York State death penalty statute represents a constitutional exercise of legislative power.

Constitutional and Statutory Provisions Involved.

A. Constitutional provisions involved.

1. *United States Constitution, Eighth Amendment:*

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. *United States Constitution, Fourteenth Amendment:*

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

B. Statutory provisions involved.

New York State Penal Law (pertinent text set forth in appendix):

1. Section 125.25, subdivision 1: Murder (intentional);

2. Section 125.25, subdivision 3: Murder (felony-murder);

3. Section 125.30: Murder sentence;

4. Section 125.35: Murder, proceeding to determine sentence; appeal.

Statement of the Case.

On the night of September 8, 1969, the respondent held up an attendant at a gas station in Canastota, New York, and fled with the attendant's wallet and the station's cash receipts, driving east in a Ford convertible. Notified of the incident, Officer Robert Mumford of the Sherrill Police Department stopped the respondent's car as he was driving through Sherrill. While he and Police Chief Thomas Reilly were questioning the respondent, the latter suddenly produced a pistol and shot both officers.

An indictment, returned by the Grand Jury of Oneida County, New York, on October 6, 1969, charged the respondent with murdering peace officers Robert A. Mumford and Thomas P. Reilly while they were in the course of performing their official duties.

Selection of the jury began on November 9, 1970, and the presentation of evidence commenced on December 4, 1970. The jury returned a verdict of guilty on December 17, 1970. Pursuant to New York Penal Law Section 125.35, a two-day penalty trial was then held to determine sentence and the jury returned the death penalty on December 23, 1970. Sentence was imposed by the trial court in accordance with the jury verdict on January 7, 1971.

Under Section 450.70 of the New York Criminal Procedure Law, the respondent appealed, as a matter of right, to the New York Court of Appeals. In his brief (Points IV and V), he raised the argument that the death penalty was unconstitutional on the authority of

Furman v. Georgia, 408 U. S. 238 (decided after the judgment in County Court on January 7, 1971, but before the filing of respondent's brief in December, 1972).

Relying exclusively on this court's decision in *Furman*, the New York Court of Appeals ruled that it had "no alternative but to hold that the penalty constitutes cruel and unusual punishment." *People v. Fitzpatrick*, 32 N. Y. 2d 499, 512 (1973). The court modified the judgment by vacating the sentence of death and remitting the case to Oneida County Court for resentencing.

Reasons for Allowance of the Writ.

In 1965, the New York State Legislature enacted a revised death penalty statute which limited the number of capital offenses to two: (1) murder of a peace officer killed in the course of performing his official duties or (2) murder committed by a defendant serving a life sentence in a state prison.[1]

The Legislature also detailed the procedure to be followed after a jury returns a guilty verdict for a capital offense. A separate jury proceeding is conducted and both parties are authorized to present "any matter relevant to sentence," including, but not limited to:

1) the nature and circumstances of the crime,

2) defendant's background and history, and

3) any aggravating or mitigating circumstances

[1]A third category was added after the crime involved here and extended the death penalty to the murder of "an employee of a local jail, penitentiary or correctional institution performing his official duties." L. 1971, ch. 1205, effective September 1, 1971.

Jury unanimity is required for imposition of the death sentence.

The New York statute presents the very heart of the capital punishment debate—namely, whether a valid and workable death penalty statute can be drafted under the *per curiam* decision in *Furman v. Georgia*, 408 U. S. 238 (1972). It is submitted that the New York Court of Appeals in effect has said "no," by ruling that, because the statute leaves the death penalty to the discretion of juries "instead of providing mandatory death sentences for all defendants who kill police officers," it constitutes cruel and unusual punishment. *People v. Fitzpatrick*, 32 N. Y. 2d 499, 513 (1973).

Petitioners respectfully urge that the New York statute represents a reasonable legislative expression of public will and that, in striking it down as unconstitutional, the New York Court of Appeals has misinterpreted the reasoning of *Furman v. Georgia*.

Clarification by this court is essential. Without it, legislatures throughout the country will be misled in creating "mandatory" death penalties which are neither workable nor desirable. In New York, the *Fitzpatrick* decision has already prompted a movement in the Legislature, viewed favorably by the governor, to enact such a death penalty.

A "mandatory" death penalty is by no means a constitutional panacea. Consider a statute, as suggested by the New York Court of Appeals, which provides mandatory death sentences for all defendants who kill police officers. Under such a statute:

1) the prosecution would retain the discretion to accept a plea to a non-capital offense.

2) the grand jury would retain the discretion to indict for a non-capital offense rather than a capital one.

3) the trial jury would retain the discretion to convict on a lesser count.

Take away all of these—i. e., plea bargaining, grand jury discretion, the trial jury's consideration of lesser offenses (removal of which presents serious constitutional implications in and of itself), and the mandatory death penalty is still unattainable. For, as a final alternative, and regardless of guilt, the trial jury can acquit altogether in order to avoid imposition of the death penalty.

Discretion (a word equated with the qualities of prudence, wisdom and cautious judgment) would be replaced by either: (1) rote application of a law, devoid of humanistic considerations or (2) circuitous attempts to avoid the application of a law, accompanied by the erosion of the basic jury function to determine guilt or innocence.

It has taken decades of thoughtful debate for the elected representatives of New York State to arrive at a codification of the death penalty which fairly reflects community sentiment and the public interest. Implicit in the law has been an abiding faith in the jury system and respect for the ideal of American jurisprudence—individual consideration of cases tempered by the judgment of a jury.

If, as seven justices of this court indicate in *Furman*, the death penalty is not *per se* unconstitutional, then the present New York statute embodies a constitutional exercise of leglislative authority.

The capital offenses fall into narrowly defined categories and the sentencing standards are as specific as

humanly desirable—namely, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. From the standpoint of evidence, both parties are given wide latitude in offering proof which has a bearing on sentence.

The discretion allowed is no more untrammeled than it would be under the proposed alternative of a mandatory death penalty. The selectivity and infrequency of application is attributable, in the first instance, to the limited categories of capital offenses and secondarily to the judgment of juries considering the facts and circumstances of individual cases—an affirmation of the integrity of the jury system.[2]

Absolute perfection is humanly impossible and the concept of judicial restraint requires that reasonable legislative enactments not be forced to give way to judicially-mandated philosophies. To hold otherwise would be in violation of this nation's constitutionally ordained separation of powers.

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[2]This point is illustrated by a comparison of this case with one decided in April, 1971, in Kings County, New York. Whereas here the respondent was convicted of intentionally killing two police officers by shooting them (he was also convicted of felony murder), the proof in the Kings County case was as follows: two suspects, both carrying guns, were engaged in robbing a storekeeper. In an attempt to apprehend them, an off-duty police officer was shot to death by one of the suspects. The suspects fled and the defendant, Darryl King, later was arrested. The other suspect was never apprehended. No guns were recovered and there was no direct testimony that the defendant fired the fatal shot. The defendant was convicted of felony murder and the jury failed to impose the death penalty. It is fair to assume that the jury, in exercising its discretion, withheld the death penalty because it was equally as probable that the other suspect, and not the defendant, actually fired the fatal shot.

Viewed accordingly, the New York death penalty statute is a reasonable and refined legislative approach to a sensitive issue and is not unconstitutional when judged by the standards of this court.

Conclusion.

It is respectfully submitted that New York Court of Appeals has decided a substantial federal question by declaring the New York death penalty statute unconstitutional in total reliance on *Furman v. Georgia*. Its decision has far-reaching impact and it is probable that its action was not in accord with the decisions of this court. Accordingly, it is requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of Court Below.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MARTIN J. FITZPATRICK,

Appellant.

Argued April 23, 1973; decided June 7, 1973.

Bruce J. Winnick, Charles E. Williams, III, Joel M. Leifer and Barbara G. Foffwarg, for appellant.

Richard D. Enders and Daniel C. Wilson, for respondent.

Chief Judge FULD. On the night of September 8, 1969, at about a quarter after nine, the defendant held up Paul DiGeorge, an attendant at a gas station in Canastota, New York, and fled with his wallet and the station's cash receipts, driving east on Route 5 in a Ford convertible. Notified of the incident, Officer Robert Mumford of the Sherill Police Department stopped the defendant's car as he was driving through Sherill. While he and Police Chief Thomas Reilly were questioning the defendant, the latter suddenly produced a pistol and shot both officers. Reilly was able to radio in that he had been shot and that his assailant's auto was heading east on Route 5; he also furnished the defendant's last name and the car's license number.

A little after ten o'clock, the defendant drove up to a trailer home, owned by Mrs. Marie DiLapi, about five miles from the scene of the shooting and, abandoning the Ford, forced her at gunpoint to drive him in her car to Syracuse. On the way, he threw a wallet out of the car

—which was later found and identified as DiGeorge's—and told Mrs. DiLapi that he had shot the two Sherill policemen and would kill her if she tried "any funny stuff." After she dropped him off in the vicinity of Kennedy and South Salina Streets in Syracuse, she went immediately to the police.

A check on the license number of the car in which the defendant was traveling disclosed that it belonged to a girl friend of his; that his full name was Martin Fitzpatrick; and that a person by that name owned a house at 1040 Midland Avenue not far from where he had alighted from Mrs. DiLapi's vehicle. Shortly after 8:00 a.m. on the following day, police officers surrounded that house. When a knock, an announcement that they were police officers and a telephone call from next door produced no answer, the police, acting without a warrant, opened the door—which was ajar—went into the house and began a search for the defendant. As they entered a room on the second floor, the defendant called—from a closet in which he was hiding—"Don't shoot. I give up." The officers seized and handcuffed him, took him out into the hall, a few feet from the closet, and advised him of his rights. Questioned about the gun he had used, the defendant stated that it was on a shelf in the closet where they had found him. An immediate search of its interior uncovered a bank bag containing the gun, with six empty shell casings in the cylinder, and 27 live rounds.

Officer Mumford died on September 9, 1969, the day after the shooting, and Chief Reilly four days later. The defendant was indicted for their murder in the Oneida County Court on October 6. In selecting the jury for trial, late in 1970, the district attorney challenged for cause 20 veniremen because of reservations about capital punishment—11 of whom had indicated, however, that their objection to the death penalty would not prevent them from returning a verdict of guilt. The pros-

ecution also utilized a number of peremptory challenges to exclude other veniremen opposed to capital punishment.

At the subsequent suppression hearing, police officers testified that the *Miranda* warnings were given to the defendant. Sergeant Carhart stated that he "was advised of his rights" and Lieutenant Burns declared that Carhart had given the suspect "his rights," adding that the defendant, when asked if he was "sure" he understood his rights, replied in the affirmative. However, the judge decided, this testimony did not constitute "sufficient information" upon which he could find that "the *Miranda* requirement was complied with * * * or that the defendant waived such rights." Accordingly, he ruled the defendant's oral statements inadmissible. Nevertheless, concluding that the gun and the other items found in the closet could not be regarded, as the defense claimed, as "fruit of the poisonous tree," the judge received them in evidence since, as he put it, "proper police investigation would [in any event] have resulted in a search of that closet and [their] discovery."

Upon the trial, the defendant was identified by DiGeorge and Mrs. DiLapi, and at least two bullets used in the killings were proved to have come from the gun found in the closet. The jury returned a verdict of guilt on December 17, 1970. A few days later, prior to the commencement of what is commonly called the "penalty trial" (Penal Law, §125.30), the defendant sought an adjournment to permit a psychiatric examination and the preparation of other relevant presentence material. The motion was denied. The defendant then decided to handle the penalty trial himself in place of his attorneys. After the People had concluded their case, he declined to call any witness or offer any evidence. The jury reported, on December 23, that it agreed that the death penalty should be imposed and, following imposition of that sentence, the defendant appealed to this court as of right (CPL 450.70).

Proof of the defendant's guilt is clear and, indeed, he does not question its sufficiency. He does, however, contend (1) that the trial judge committed error, requiring a reversal of the conviction and a new trial, when he received in evidence the gun and other articles found in the closet and (2) that, in any event, the United States Supreme Court's decision in *Furman v. Georgia* (408 U. S. 238) compels annulment of the death sentence imposed on the ground that, as the Eighth Amendment of the United States Constitution was construed in that case, such sentence amounts to cruel and unusual punishment.

Fruit of the Poisonous Tree

Contrary to the defendant's contention, the gun and the other items may not be deemed inadmissible in evidence as fruit of the poisonous tree, that is, as the product of the improperly obtained statements.

There are, it is settled, exceptions to the rule that evidence is inadmissible if uncovered as a result of information obtained by impermissible conduct on the part of police officers. (See, e.g., *Wong Sun v. United States,* 371 U. S. 471, 489; *Nardone v. United States,* 308 U. S. 338, 341 [where the connection between the lawless conduct of the police and the discovery of the challenged evidence had "become so attenuated as to dissipate the taint"]; *Silverthorne Lbr. Co. v. United States,* 251 U. S. 385, 392 [exclusionary rule has no application where government learns of the evidence "from an independent source"]; see, also, *People v. Dentine,* 21 N. Y. 2d 700, 971; *United States v. Williams,* 436 F. 2d 1166, 1170, cert. den. 402 U. S. 912; *Payne v. United States,* 294 F. 2d 723, cert. den. 368 U. S. 883.) As the Supreme Court wrote in *Wong Sun v. United States* (371 U. S. 471, 487-488, *supra*), "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police.

Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

In line with this reasoning, the courts have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence. (See, e.g., *United States v. Seohnlein*, 423 F. 2d 1051, cert. den. 399 U. S. 913; *Wayne v. United States*, 318 F. 2d 205, cert. den. 375 U. S. 860; *People v. Regan*, 30 A. D. 2d 983; *People v. Soto*, 55 Misc. 2d 219; see, also, *Lockridge v. Superior Ct. of Los Angeles County*, 3 Cal. 3d 166, cert. den. 402 U. S. 910; Note 43 ALR 3d 385, 404; Maguire, How to Unpoison the Fruit, 55 J. Crim. L. C. & P. S. 307, 313-317; but cf. *United States v. Paroutian*, 299 F. 2d 486, 489 [319 F. 2d 661]; Pitler, "Fruit of the Poisonous Tree", 56 Cal. L. Rev. 579, 627-630.) In other words, as one commentator put it, the inevitable discovery factor "permits the government to remove the taint from otherwise poisoned fruit by establishing that the unlawful act from which it resulted was not a *sine qua non* of its discovery." (Maguire, How to Unpoison the Fruit, 55 J. Crim. L. C. & P. S. 307, 313.)

In the present case, it was entirely fortuitous that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him and, as a result, very quickly learned where the gun was located. It is quite unreal to suggest that, but for the defendant's admission, the police would not have looked for incriminating evidence in the closet where

he had been hiding. The weapon, employed in a robbery and a shooting of two police officers, is a prime object of any investigation and, unless thrown away, was certain to be either on or near the defendant. If not found upon him, the next most reasonable place to look for it was where he had been just before he was seized. Since, then, a search of the closet was inevitable regardless of the defendant's answers to questions put to him beyond its confines, it may not fairly be said that the police "exploited" the "illegality" involved in their interrogation.

It has been suggested that the "inevitable discovery" exception may erode the "exclusionary rule as a viable deterrent to illicit police activity" (Pitler, "Fruit of the Poisonous Tree", 56 Cal. L. Rev. 579, 630; see, also, *United States v. Paroutian,* 299 F. 2d 486, 489, *supra*), chiefly because it may not always be certain what the police *would* have done, clear as it may be what they *could* have or *should* have done. However, the exception may safely be applied—and erosion of the salutary exclusionary rule avoided—as long as the prosecution has the burden of proving "that the illegal act was not a *sine qua non* of the discovery of the otherwise tainted evidence." (Maguire, How to Unpoison the Fruit, 55 J. Crim. L. C. & P. S. 307, 317; see, also, *Somer v. United States,* 138 F. 2d 790, 792.) The "*sine qua non* test," Maguire continued (*ibid.*), "if properly administered, serves well the *raison d'etre* of the exclusionary rule by denying to the government the use of evidence 'come at by the exploitation of . . . illegality' and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza." In the case before us, the defendant is clearly not entitled to have the gun suppressed, for, as indicated, the People have here unquestionably met their burden of proving that the gun would inevitably have been located in the course of the police officers' investigation.

The Legality of the Search and Seizure

The defendant, however, goes on to argue, first, that, even assuming the validity of the "inevitable discovery" exception and the lawfulness of his arrest, the seizure of the gun violated constitutional demands because it was not within the area from which he "might obtain weapons or evidentiary items" as prescribed by *Chimel v. California* (395 U. S. 752, 766). And, second, he maintains that the gun should have been excluded because the entry, search and seizure—and even the arrest—were unconstitional because accomplished without a search or arrest warrant and without probable cause to believe that the defendant was within the house. The arguments lack substance.

In the *Chimel* case (395 U. S. 752, *supra*), the court held that the lawful arrest of an accused, where accomplished without an arrest warrant, or a warrant to search the area where he is found, permits a search only of his person and the area from which he "might obtain weapons or evidentiary items" (395 U. S. at p. 766). Since he had been removed from the closet's interior, the defendant urges that he was outside the authorized "grabbable" area. Nothing in *Chimel* requires so narrow a reading of the Fourth Amendment. The court did not disapprove of a search of the "room" or area where the "arrest occurs" (p. 763); it condemned only a search "'remote in time or place from the arrest'" (p. 764). The immediate search of the very closet where the defendant was arrested is far different from the proscribed search of "closed or concealed areas" (p. 763), even in the room where a defendant is arrested. There was here no quality of "rummaging at will" among the defendant's effects at which the Fourth Amendment is aimed (p. 767). And the fact that the police had handcuffed the defendant did not render the closet search unauthorized. As this court remarked in *People v. Floyd* (26 N. Y. 2d 558, 563), "it

is not at all clear that the 'grabbing distance' authorized in the *Chimel* case is conditioned upon the arrested person's continued capacity 'to grab'."

Nor was there need in this case for a search or arrest warrant. The shootings by a man named Fitzpatrick, whose car had been identified as belonging to a friend of "Martin Fitzpatrick" and whose trial led close to a house owned by a man of that same name, as well as the defendant's incriminating words of surrender just before the officers found him in the closet—all these gave the police more than sufficient "probable cause" to arrest him. Moreover, the "permissible scope of search" must be at least "as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." (*Warden v. Hayden,* 387 U. S. 294, 299.) "The Fourth Amendment does not require police officers to delay in the course of an investigation", the court declared in the *Hayden* case, "if to do so would gravely endanger their lives or the lives of others. Speed here was essential" (387 U. S., at pp. 298-299). It was just as essential in the present case, despite the passage of some hours since the shootings had occurred. Those hours were undoubtedly spent in interviewing DiGeorge and Mrs. DiLapi, in checking on the car, learning the defendant's identity, ascertaining the location of the house he owned and where he was likely to go. It was certainly not unreasonable for the police to believe that he would conceal himself, as he actually did, in the house which he owned and in whose vicinity he had last been seen. The circumstances demanded that they act quickly. He had fatally wounded two persons, had threatened the life of a third and was known to be armed. Proper police procedures, as well as elementary considerations of prudence, required the officers to enter and search the house for him in order to prevent his escaping and endangering the lives of others. Accordingly, no constitutional

rights of the defendant were violated by the warrantless entry, search and arrest.

The Death Sentence as Cruel and Unusual Punishment

Section 125.30 of the Penal Law provides that a defendant shall be sentenced to death following a jury verdict convicting him of murder if, after a further "proceeding", the jury unanimously agrees "on the imposition of the penalty of death" (Penal Law, §125.35) and the court is "satisfied" that the "victim of the crime was a peace officer who was killed in the course of performing his official duties" (Penal Law, §125.30, subd. 1, par. [a], cl. [i]). Following the presentation of evidence at the "penalty trial" and the court's charge to the jury, that body retires "to consider the penalty to be imposed". And, continues subdivision 5 of section 125.35,

> "If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the sentence of imprisonment, the court shall discharge the jury and shall impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of imprisonment."

As a reading of that provision makes clear, whether the death sentence is to be imposed rests in the discretion of the jury, and, as already indicated, we must say whether *Furman v. Georgia* (408 U. S. 238, *supra*) requires a decision that that penalty constitutes "cruel and unusual punishment" under the Eighth Amendment as interpreted by the Supreme Court.

The defendants in the three separate cases dealt with in *Furman* were sentenced to death, following trials by juries, one for murder and two for rape.[1] In each instance, the state legislature left the determination whether the penalty should be death or some lighter punishment to the discretion of the judge or a jury.

Of the members of the court comprising the majority in *Furman*, only two—Mr. Justice BRENNAN (408 U. S., at pp. 257-306) and Mr. Justice MARSHALL (at pp. 314-371)—concluded that the infliction of the death penalty constitutes "cruel and unusual punishment" and that, consequently, the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. The other three justices, who concurred in the court's judgments of reversal, found it unnecessary to reach that "ultimate question" (per STEWART, J., p. 306). Instead, pointing out that in each of the cases before the court, the legislature had not itself mandated the death penalty, they held impermissible the practice of committing to the untrammeled discretion of a jury the power to pronounce life or death. (See, e.g., Note, The Supreme Court, 1971 Term, 86 Harv. L. Rev., at p. 76 *et seq.;* Note, 47 St. John's L. Rev. 107.) Mr. Justice DOUGLAS condemned "a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants * * * should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12" (408 U. S., at p. 253). Thus, concluded Justice DOUGLAS, "these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the

[1]The three cases—entitled, in the Supreme Court, *Furman v. Georgia, Jackson v. Georgia* and *Branch v. Texas*—may be found, respectively, in the Reports of those jurisdictions in 225 Ga. 253, 225 Ga. 790 and 447 S. W. 2d 932.

laws that is implicit in the ban on 'cruel and unusual' punishments" (pp. 256-257). Mr. Justice STEWART was also of the view that the sentencing practices provided by the statutes in question—vesting juries and judges with discretion to determine whether the penalty should be death or life imprisonment—offend against the prohibition of the Eighth Amendment. "[T]he death sentences now before us", wrote Justice STEWART (pp. 309-310), "are the product of a legal system that brings them * * * within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. *Robinson v. California*, 370 U. S. 660. In the first place, it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. *Weems v. United States*, 217 U. S. 349. * * * I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." And Mr. Justice WHITE—addressing himself to the question whether capital punishment statutes are unconstitutional when "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized" (p. 311)—reached the conclusion that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" (p. 313). In short, added Justice WHITE, "past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of

the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment" (p. 314).[2]

Since, then, the New York statute here challenged (Penal Law, §125.35, subd. 5) leaves infliction of the death penalty solely to the discretion of the jury, we conclude, in light of the Supreme Court's reading of the Eighth Amendment in *Furman* (408 U. S. 238, *supra*),

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[2]In sharp contrast, Chief Justice Burger, in the course of his dissenting opinion, stated, in effect, that, if constitutionality turned on whether the legislature provided mandatory death sentences "in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge * * * I would have preferred that the Court opt for total abolition" (408 U. S. at p. 401). "I could more easily be persuaded," continued the Chief Justice (pp. 402-403), "that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution * * * I had thought that nothing was clearer in history, as we noted in *McGautha v. California*, 402 U. S. 183, one year ago, than the American abhorrence of 'the common-law rule imposing a mandatory death sentence on all convicted murderers.' 402 U. S. at 198. * * * If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list. But it has been widely accepted that mandatory sentences for crimes do not best serve the ends of the criminal justice system. Now, after the long process of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges."

that we have no alternative but to hold that that penalty constitutes cruel and unusual punishment within the sense of that provision. The circumstance that the penalty is limited to those found guilty of killing police and other peace officers is irrelevant; it does not alter or affect the fact that the Legislature, instead of providing mandatory death sentences for all defendants who kill police officers, has vested juries with a discretion to decide, case by case, whether that ultimate punishment should be inflicted.[3]

The judgment appealed from should be modified by vacating the sentence of death and remitting the case to the Oneida County Court for resentencing, and, as so modified, the judgment should be affirmed.

WACHTLER, J. (concurring). I agree with the result and most of the reasoning adopted by the majority; however, there are two parts of the decision which trouble me.

Initially I do not feel it would be wise for this court to adopt the "inevitable discovery" doctrine. I can accept, with some reluctance, a policy of allowing evidence to be obtained without a warrant where the operation of law would have made its future discovery inevitable. Both *Wayne v. United States* (318 F. 2d 205, cert. den. 375 U. S. 860) and *People v. Soto* (55 Misc. 2d 219), cited in the decision, can be rationalized on that ground. However, allowing "poisoned" evidence in on the ground that some hypothetical police search would have uncovered the evidence anyway results in a speculative theory with no discernable limits. Here there was no "independent source" for the police search. (See *Silverthorne Lbr. Co.*

[3]In this view, we find it unnecessary to consider the defendant's additional contentions relating (1) to the exclusion from the jury of jurors opposed to capital punishment and (2) to the denial of his application for an adjournment of the penalty trial pending his psychiatric examination and the preparation of evidence to support his plea for a sentence of imprisonment.

v. United States, 251 U. S. 385, 392.) It is not "inconceivable" that the police would not have searched the closet. In point of fact, they did not search the closet until told by defendant that the gun was there. It is not at all obvious that the gun would be found near where defendant was hiding. Defendant had left the scene of the crime several hours prior to his apprehension. Most defendants hide, destroy, or dump the incriminating weapon as soon after the crime as possible. In fact, few defendants are arrested in possession of the murder weapon several hours after the commission of the crime. The "inevitable discovery" doctrine is speculative at best, and there is absolutely nothing to prevent the expansion of the doctrine far beyond "the closet".

The decision states that the scope of the doctrine is coextensive with what "the normal course of police investigation" would have inevitably turned up. "The normal course of police investigation" differs greatly from one police department to another and even within departments, so theoretically at least the constitutional standard would differ from locale to locale.

In addition, defining what "the normal course of police investigation" would *inevitably* have turned up could prove most difficult. In this case, the decision states that unless the gun was thrown away "Once it was not found upon him, the next most reasonable place to look for it was where he had been just before he was seized". Does that mean this doctrine is limited to "the next most reasonable place" and excludes the second next most reasonable place? And who can produce a priority list of "reasonable" places to use as a standard in these types of cases? And what does "where he has been seized" mean? Is it limited to the closet or does it include the house? And if the defendant is apprehended outside the house, how will it be possible to give any consistent definition to the term "where he has been seized"? I am

afraid these are not questions that can ever be worked out with any consistency on a case by case basis.

Even if we could be fairly certain that a subsequent police search would turn up the evidence, we could not be certain that the search would have been conducted in a constitutional manner. In the case at bar, it was at least arguable that the warrantless search of the house was unconstitutional. The question arises if the "inevitable discovery" doctrine would expunge the taint from an unconstitutional and warrantless search if the People could convince a Judge that regular police procedure would have produced a warrant independent of the illegal search.

As I stated in my dissent in *People v. Brosman*, 32 N. Y. 2d 254, I think that the *application* of standards is so inherently difficult in search and seizure cases (really in the entire criminal area) that we must be certain that the standard at least is clear and unambiguous. I think both for the sake of certainty and the integrity of our State and Federal Constitutions we should follow an objective test in situations such as these. If the police did in fact discover the evidence as the result of an unconstitutional action, the evidence should be suppressed. The "inevitable discovery" doctrine is so ambiguous and so subject to abuse that I think it is unwise to adopt it.

Equally bothersome to me is the majority's interpretation of *Chimel v. California* (395 U. S. 752). Their decision implicitly adopts the caveat in *People v. Floyd* (26 N. Y. 2d 558, 563) that "it is not at all clear that the 'grabbing distance' authorized in the *Chimel* case is conditioned upon the arrested person's continued capacity 'to grab' ". I do not believe that the *Chimel* rationale would uphold a search of a "grabbing area" after the defendant can no longer grab. Contrary to the assertion in the decision, the *Chimel* court never approved a search of the area where the "arrest occurs". The Supreme

Court only approved a search where there is a danger to the officer or there is a possibility the evidence will be concealed or destroyed. (395 U. S. 752, 763, *supra.*) Later the court emphasized that the police may search the area "from which the person arrested *might* obtain weapons or evidentiary items". (*Id.*, at p. 766; italics added.) The court did not say and clearly did not mean the police could search where an arrested man *might have* obtained weapons or evidentiary items. The court specifically held that a search of constitutionally protected areas could not even be conducted in the room where the "arrest occurs" if those areas are not within reach of the arrested man. (*Id.*, at p. 763.)

The grabbing area delineation only makes sense if it is supported by a rationale resting on danger to the police or evidence destruction. If a search could be conducted after the apprehended person can no longer reach any evidence or weapon, the definition of the allowable search area as, in effect, the "grabbing area" becomes completely arbitrary and without any underlying justification. If the *Chimel* case is to be overruled or limited, it is the place of the Supreme Court and not our court to do so.

I agree that there were exigent circumstances which justified the police entering the house without a warrant. Had the gun been in open sight, it could have been seized because once the defendant gave the police a justification for entering the house he no longer had a legitimate expectation of privacy and thus no constitutional protection from apparent evidence in the area the police had legitimately entered. However, in the case at bar, the gun was in a bag hidden from open view. The decision notes there was no "rummaging at will" but that was only because the unconstitutionally obtained confession allowed the police to know exactly where the gun was hidden. The hypothetical police search envisioned by the report under the "inevitable discovery" doctrine would have "inevitably" led to a great deal of "rummaging around".

I might add that I am not at all certain that the majority had to reach the search and seizure question in its decision after having adopted the "inevitable discovery" doctrine. If "the normal course of police investigation" would have turned up the gun, why not also assume that the hypothetical search was conducted pursuant to a hypothetical search warrant? It is certainly "the normal course of police investigation" to obtain a warrant where one is required. Of course, we are well aware that police, in completely good faith, often fail to obtain warrants even in situations obviously calling for warrants just as they often fail to search areas which, with the aid of hindsight,* seem to have been obvious places to search.

In conclusion then, although I believe that the receipt of the gun in evidence constituted error, it should be considered harmless in light of the overwhelming proof establishing the defendant's guilt of the homicides. Accordingly, I concur in the court's decision that the judgment of conviction be modified and the case remanded to the trial court for resentencing.

Judges BURKE, BREITEL, JASEN and GABRIELLI concur with Chief Judge FULD; Judge WACHTLER concurs in a separate opinion in which Judge JONES concurs.

Judgment modified and case remitted to Oneida County Court for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

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*I am also afraid that the "inevitable discovery" doctrine cannot help but become *sub silentio* a result-oriented theory.

APPENDIX B.

New York State Penal Law, Section 125.25, subdivision 1—Murder (Intentional).

§125.25 Murder.

A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person.

APPENDIX C.

New York State Penal Law, Section 125.25, subdivision 3—Murder (Felony Murder).

§125.25 Murder.

A person is guilty of murder when:

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or if immediate flight therefrom, he, or another particpant, if there be any, causes the death of a person other than one of the participants.

APPENDIX D.

New York State Penal Law, Section 125.30—Murder; sentence.

§125.30 Murder; sentence.

1. When a defendant has been convicted by a jury verdict of murder as defined in subdivision one or three of section 125.25, the court shall, as promptly as practicable, conduct a further proceeding, pursuant to section 125.35, in order to determine whether the defendant shall be sentenced to death in lieu of being sentenced to the term of imprisonment for a class A felony prescribed in section 70.00, if it is satisfied that:

(a) Either:

(i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or

(ii) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or having escaped from such confinement or custody the defendant was in immediate flight therefrom; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime; and

(c) There are no substantial mitigating circumstances which render sentence of death unwarranted.

2. If the court conducts such a further proceeding with respect to a sentence, the jury verdict of murder recorded upon the minutes shall not be subject to jury reconsideration therein.

APPENDIX E.

New York State Penal Law, Section 125.35—Murder, proceeding to determine sentence; appeal.

§125.35 Murder, proceeding to determine sentence; appeal.

1. Any further proceeding authorized by section 125.30 with respect to a sentence for murder shall be conducted in the manner provided in this section.

2. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the maximum and possible minimum terms of imprisonment and to the possible release on parole of a person sentenced to a term of imprisonment for a class A felony.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposi-

tion of the sentence of imprisonment, the court shall discharge the jury and shall impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of imprisonment.

6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of imprisonment.